1949

The State of Utah v. William Campbell aka William Petterson : Brief of Appellant

Utah Supreme Court

Samuel B. Blackham; Attorney for Defendant and Appellant;

IN THE SUPREME COURT OF

THE STATE OF UTAH

THE STATE OF UTAH,

Plaintiff and
Respondent,

vs.

WILLIAM CAMPBELL, also known as
WILLIAM PETTERSON,

Defendant and
Appellant.

No. 7322

APPELLANT'S BRIEF

SAMUEL E. BLACKHAM

Attorney for Defendant
and Appellant.

INDEX

AUTHORITIES

IN THE SUPREME COURT OF

THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff and Respondent, vs. WILLIAM CAMPBELL, also known as WILLIAM PETTERSON, Defendant and Appellant.	No. 7322

APPELLANT'S BRIEF

PRELIMINARY STATEMENT

This is an appeal from the judgment of the Fourth District Court. The defendant, William Campbell, also known as William Petterson was convicted of the crime of grand larceny and sentenced to serve for a term of not less than one nor more than ten years in the Utah State Penitentiary. Judgment was pronounced

February 25, 1949 (R, 38). Notice of Appeal was served on counsel for the State of Utah and filed with the clerk of the court on February 28, 1949 (R, 33). Proposed Bill of Exceptions was served upon counsel on March 21, 1949 (R, 34) and was approved, allowed, and settled by the court on March 22, 1949 (R, 35). The record was filed with the Clerk of this Court on April 1, 1949.

STATEMENT OF FACTS

The defendant was arrested on October 6, 1948, by officer Walter Bench of the Provo City police at around eleven o'clock in the evening (R, 72-76). At the time of his arrest the defendant had in his possession a suitcase (Ex. B; R, 73, 74). The defendant had first been seen with the suitcase between 5:00 P.M. and 6:00 P.M. on that day by one Edward Johndrow who was a fry cook at Harvey's

Cafe, 97 North University Avenue, which is situated on the other corner of the intersection and cater-corner from the bus station (R, 37 38). He was also observed by officer Fred Adamson who conversed with him at Harvey's Cafe shortly after six o'clock (R, 50). The defendant then had the suitcase with him. The defendant tried to sell the suitcase while in Harvey's (R, 39) and in other places of business in the close vicinity (R, 47, 67, 68).

One Carol Ann Bulow, according to her testimony, boarded a bus at Richfield, Utah, enroute to the State of Washington. At that time she had a brown striped suitcase which contained clothing, a little sewing and a few miscellaneous items (R, 8). She placed the suitcase in the rack above her seat in the bus. The bus stopped at Nephi for ten minutes where

Miss Bulow got off with other passengers (R, 9). To the question of counsel as to whether she remembered having looked for her suitcase when she got off at Nephi she answered "I'm sure I did." From the time she got off of the bus at Nephi until it was exhibited to her in court at the trial Miss Bulow never again saw the suitcase (Tr, 18). She identified the suitcase (Exhibit A) as her property (Tr, 11).

On the 12th day of January, 1949, defendant's counsel was engaged in the trial of another case before the District Court and during the noon recess he was called on the telephone by the District Attorney and asked whether it would be possible to move the date of trial of the instant case from the 23rd of February to the 24th of January. The District Attorney was told of another possible engagement of

counsel that would probably conflict with the earlier date but counsel advised him that he would ascertain from his family while at lunch whether there would be any conflict with the earlier date. At about 1:30 P.M. counsel called the District Attorney to tell him that the earlier date was agreeable but the District Attorney then advised counsel that he had set another case which he would rather try on January 24th and that he was going to have the contents of the suitcase appraised by one Evan Thomas and would then return the contents to Miss Bulow. Upon remonstrance of counsel the District Attorney stated that he was not asking counsel to agree to this procedure, that he was telling counsel what he was going to do and that he would have Mr. Thomas at the police station within a few minutes and inquired whether counsel would be there and if he wanted

the defendant present. Counsel went to the police station and soon afterwards the District Attorney, Mr. Thomas, the defendant and certain officers arrived (Tr, 115-117). The District Attorney then told Mr. Thomas what he wanted and Mr. Thomas then proceeded to write down his opinion of values of some of the articles on a sheet of paper that had been typed as an inventory of the goods in the suitcase. Counsel took issue with Mr. Thomas as to the values he was ascribing to the articles and as to the basis of his valuation and after some argument (Tr, 24) the District Attorney told Mr. Thomas to go ahead and make the valuation. Counsel informed those present that he was due in Judge Dunford's court at two o'clock and therefore had to leave. He left before the valuation was made. Counsel neither consented to the District

Attorney nor to any other person that the valuation of the goods should be made in that manner or that this would be proper evidence to introduce in court. Counsel made no effort to secure other appraisers or to make any other arrangement (Tr, 115-120).

At the trial of the case Exhibit "D" was received in evidence over the strenuous objection of counsel (Tr, 82-83). This exhibit constitutes the only evidence of value of the property alleged to have been stolen that was introduced by the State. The defendant later moved to strike Exhibit "D" which motion was denied by the court (Tr, 110-111

ASSIGNMENT OF ERRORS

I

The court erred in admitting in evidence over the objection of the defendant plaintiff's Exhibit "D".

II

The court erred in overruling defendant's motion to strike plaintiff's exhibit "D".

III

The court erred in refusing to charge the jury, as requested by the defendant, in his requested instruction No. 8.

IV

The court erred in giving to the jury its instruction No. 14a.

V

The court erred in refusing to charge the jury, as requested by the defendant in his requested instruction No. 1.

VI

The court erred in refusing to charge the jury, as requested by the defendant in his requested instructions Nos. 2 and 7.

VII

The court erred in refusing to charge the jury as requested by the defendant in his requested instruction No. 7.

ARGUMENT

I

THE COURT ERRED IN ADMITTING IN EVIDENCE OVER THE OBJECTION OF THE DEFENDANT PLAINTIFF'S EXHIBIT "D".

II

THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S EXHIBIT "D".

The defendant was charged by complaint (R, 2) and information (R, 3) of the crime of grand larceny by stealing one suitcase and contents, the personal property of Carol Ann Bulow of the approximate value of $75.00.

Of the property alleged to have

been stolen, only the suitcase (Exhibit A, Tr, 28-29) was offered by the State and received in evidence. The contents of the suitcase, although at the time within the jurisdiction of the court, had previously been returned to Miss Bulow by the District Attorney (Tr, 78, 79) and were not in court or introduced in evidence. The suitcase was of the probable value of $6.00 (Tr, 88).

The only evidence of the value of the contents of the suitcase introduced by the State and received in evidence was plaintiff's Exhibit "D". This exhibit was an itemized list of the contents of the suitcase with certain figures entered in handwriting opposite each article which represented the value placed on the article by Mr. Evan Thomas in the police station at Provo on January 12, 1949 (Tr, 22, 25, 54, 116). This exhibit was admitted in evidence

over the objections of the defendant that it was incompetent, irrelevant and immaterial and not the best evidence (Tr, 82), that defendant had no opportunity for cross examination and for the further reason that it is hearsay and improper to admit at the time (Tr, 83).

The defendant later made the following motion to strike: (Tr, 110-111)

> "If the Court please, at this time I'd like to make the following motion to the Court: Comes now the defendant and moves the Court to strike Plaintiff's Exhibit . . . D upon the ground that it is incompetent, not real evidence, or evidence of the most reliable character which it is within the power of the State to produce; that it is not shown that the property described and valued in said exhibit is beyond the process and jurisdiction of this court but on the other hand it is shown that it is subject to such processes and jurisdiction; that the jury is entitled to view and inspect the property claimed to have been stolen by the defendant and to determine its value independently of any witness; that the admission of this exhibit is prejudicial to the defendant and affords him no opportunity to produce any evidence as to the value of said property and affords

the jury no opportunity of arriving at its independent judgment as to the value of such property."

The motion to strike was denied by the court and exception taken (Tr, 111).

In the admission of Exhibit "D" over the objection of the defendant and the denial of defendant's motion to strike, we submit that the court committed grave error to the prejudice of the defendant and the denial to him of substantial and constitutional rights.

It will be noted that Carol Ann Bulow who claimed to be the owner of the suitcase and its contents was present in court and testified in behalf of the prosecution (Tr, 7-18, etc.). She is a resident of Richfield, Utah. The same process that brought her before the court as a witness could have returned to the court, for the purposes of the trial, the contents of the suitcase that had theretofore been returned to her by the District

Attorney.

In a case involving the alleged crime of grand larceny where the paramount issue was the value of the property claimed to have been stolen, and more particularly where, as here, the margin between the value justifying a conviction for grand larceny and that for petit larceny was slim (some $17.00) we feel that the defendant inter alia was deprived of substantial rights in not having the property presented in court for the purpose of evaluating it and for its exhibition to the jury so that it could make its independent determination of value.

In 20 Am. Jur., Section 403 p 364- the rule is generally stated as follows:

> "It is an elementary principle of the law of evidence that the best evidence of which the case in its nature is susceptible and which is within the power of the party, to produce, or is capable of being produced, must always be adduced in

proof of every disputed fact. Secondary evidence is never admissible unless it is made manifest that the primary evidence is unavailable, as where it is shown that it has been lost or destroyed, is beyond the jurisdiction of the court, or is in the hands of the opposite party who, on due notice, fails to produce it. This rule does not purport to include the substitution of weaker for stronger evidence, which any litigant has the right to decide for himself. It only comprehends a situation where the evidence offered is clearly substitutionary in its nature, although directed to the same issue as the original evidence which is withheld. Expressed differently, the rule that the best evidence must be produced means, not that the courts require the strongest or most cogent evidence, but that no proof shall be admitted which from its character presupposes greater or better evidence in the possession of such party, without an adequate explanation for such practice.

And again, Section 435, p 365-6:

"What constitutes the best evidence and what is secondary evidence depend largely upon the nature and character of that to which the evidence relates. Generally, however, the best evidence is such proof as is the best obtainable under the existing circumstances; it is not the most convincing or the most documented, in the generic sense of such terms,

but the most superior, as contrasted with any other form of proof that the party could offer. The law requires the production of the best evidence which the nature of the case admits of and which is within the power of the party to produce, and forbids the introduction of any evidence which presupposes better or greater proof in the possession or within the power of the party who makes the offer. Evidence is not excluded by reason of the rule requiring the best evidence unless it shows in itself that there is a higher grade of evidence or a more original source of information, or, in other words, that there is an attempted substitution of an inferior for a superior class of evidence. In a broad sense, the best evidence rule embraces within its application every fact or issue that may be in controversy; but in modern practice the rule is usually invoked where proof is to be made of some fact of which there is a record in writing or where there is an attempt to substitute oral for documentary evidence." (Underscoring supplied.)

The above rule is of ancient origin Thayer Prelim. Tr. Ev. pp 503, 504, having received the approbation of the courts in cases too numerous to require citation. As stated above, the rule is usually invoked in modern cases, only in the case of writings, Cf. Nichols Applied

Evidence, Vol. 5 p. 4187, and our research has failed to disclose any case where its application has been made in a situation similar to that of the instant case.

While we have been unable to find any cases dealing with the precise problem here involved, the absence of such cases indicates strongly the immemorial acceptance of the general rule above stated in such circumstances. No reason presents itself why the rule above stated should not be applicable in determining the admissibility of Exhibit "D" in the instant case, where one's personal liberty is at stake. Certainly exhibit "D" was not the best evidence which was within the power of the State to produce, as to the nature and value of the goods alleged to have been stolen. The State could have produced the articles and should have done so.

"The rule requiring the production of the best evidence, of which

the case in its nature is susceptible, is adopted for the prevention of fraud, and is declared to be essential to the pure administration of justice . . . . By requiring the production of the best evidence, the law denies the admissibility of that evidence which is merely substitutionary in its nature, when the original evidence can be had." Anglo-American Packing, etc., Co. v. Cannon, 31 Fed. 313, 314. (underscoring supplied).

"The judges and sages of the law have laid it down that there is but one general rule of evidence, the best that the nature of the case will admit." Omychund v. Barker, 1 Atk. 21, 49, Willes 538, 26 Reprint 15, Willes 538.

If the rule above stated is adopted (in the case of writings) for the prevention of fraud certainly any lesser degree of proof, under the circumstances of the instant case, would not be justifyable and the opportunities for fraud would be multiplied.

If the rulings of the court below, as above mentioned, should be sustained it would place in the hands of any prosecutor a powerful weapon which if used by an unscrupulous one might well be a weapon of

abuse, persecution and fraud. For instance, a prosecutor might, under such rulings, connive with a person or persons who might have a grievance against a defendant on trial for a similar crime and deliberately fake the value of the articles stolen for the purpose of convicting a person of a felony, when, if the goods were produced and the valuation made in court (instead of at a star chamber session) it would be apparent that the goods were patently of a value less than would justify conviction for felony.

We suggest to the Court that if not actually in fact, at least in spirit and purpose, the constitutional right of a witness to be confronted by witnesses has been violated in this case. Undeniably the articles stolen were the most important witnesses either for or against the defendant.

May we now examine briefly the

opinion evidence of the witness Evan Thomas, the only witness who gave any testimony of value in this case. After having tried unsuccessfully to have Exhibit "D" or any evidence of value received in evidence this witness was excused temporarily (Tr, 21-36), andwas later recalled (Tr, 81). He thereupon identified Exhibit "D", stated that on January 12th at the request of the District Attorney and when defense counsel, the defendant, and certain officers were present, he placed certain values down on the exhibit at the time he made the list of articles and that was the list and values shown on Exhibit "D". The exhibit was then offered and received in evidence over defendant's objections (Tr, 81-83). Up to this point the foregoing was the only evidence of value before the court.

On cross examination the witness

was asked his opinion of the value of a certain plaid house dress upon which he had placed a value on Exhibit "D" and his response was "That I can't tell you." Upon being pressed for his opinion counsel for the State sprang to his assistance making the following objection: (Tr, 84)

> "Wo: just a minute. We object to that as being uncertain, indefinite, irrelevant, incompetent and immaterial. If he will point to the certain article listed in Exhibit D that has been testified to that was taken from the suitcase, we'll withdraw the objection, But we think it's objectionable."

The court overruled the objection and then upon being asked again for his opinion as to the value of the house dress, the witness answered, "Well it could be, if it's a house dress, it could be a possible $2." He was then asked his opinion as to the value of one slip apron (Tr, 84) and he answered, "It may be a possible $.89." He was then asked the value of a silk robe which he placed at $5 and then the following

took place:

"Q . . . Now, give me your opinion of the present value of one black jacket.

A Might I ask a question, your Honor?

The Court: Yes, you may ask it.

The Witness: Was there more than one jacket that you have reference to, Mr. Blackham?

Mr. Blackham: I'm asking you for your opinion of the value of one black jacket that you (Tr, 85) valued on the 12th of January.

A I'm sure out of 40 items that I couldn't list here the value of every one of those items."

Upon being pressed, and after objection by Mr. Boyle and the overruling of the objection by the court the witness answered "I'll say $4." (Tr, 86). The witness was asked concerning the other items listed on which he placed some value but he showed his testimony was in most

respects, as above shown, merely a guess because he couldn't remember or place a value on one pair of slack pants (Tr, 86); was uncertain as to six pair of underwear (Tr, 87); he remembered specifically one roll of films (Tr, 8[illegible]); did not recall a pair of house slippers that had sheep lining on although these were the subject of controversy between him and defense counsel at the police station on January 12th (Tr, 89-90); and did not remember a scarf upon which he placed a value of 49 cents (Tr, 92).

May a citizen of this State be deprived of his liberty on this kind of evidence?

(a) No right of cross examination.

As part of defendant's objection to Exhibit "G" defendant urged that he was thus deprived of the right of cross examination. We submit that the exhibit should also have been excluded on that basis.

Defendant's counsel went through the motions of cross examining the witness Thomas but from what we have shown above the witness could not be examined on his valuation, the description of the articles valued on January 12th or their condition at the time. The prosecution apparently realized that when counsel interposed the objection at the outset of the examination of the witness. He in effect said, "you can't cross examine this witness about values unless you take Exhibit "D", point to the article listed on it and then ask your question." Obviously, if the defense had done that all the witness could have done would have been to repeat again parrot-like the values he had placed on the article on January 12th. He demonstrated conclusively that at the time of his testimony he could not identify the articles or place an accurate appraisal on them. And in this regard it is interesting to note that of

34 articles listed on Exhibit "D" there were only 11 of them on which the witness placed the same value on cross examination. We doubt very much whether the witness could have been taken back over his cross examination and have come out with the same figures on the items. Counsel attempted to re-examine the witness on the value of one pair of slack pants that he stated early in his testimony he couldn't remember (Tr, 86) but counsel was stopped by the court from repeating the question (Tr, 91).

The State may urge that because the defendant and his counsel were present at the City Jail on January 12th and there had the opportunity of examining the article as well as the witness as to the values placed on the exhibit, that the defendant was not denied the right of cross examinatic The record shows that as to one or two articles counsel did attempt to examine the witness but the examination only created

confusion but even though the witness was examined at length, and even though two other witnesses were secured at that time, as suggested by the witness (Tr, 30) the actual giving of the testimony would have been (as it actually was) taken in the absence of the court and the jury and thus violate the rights of the accused to a trial in the presence of the judge and jury. 16 C. J. p 812.

Furthermore, assume that three equally credible witnesses had each made valuations, neither of which agreed with the others and assume that one or two had placed the total value at less than fifty dollars, how could the jury determine the fact without being able to examine the articles themselves? Of course under such a situation the jury would be bound under the provisions of Section 103-32-5 Utah Code Annotated hereinafter set forth, to

find the defendant guilty of petit larceny. How then is the situation any different when there is a great conflict in the testimony of the only witness as to value, even though the total amounts as testified to by him on the different occasions add up to more than fifty dollars?

We submit that the constitutional rights of the defendant were violated in all of the foregoing respects.

III

THE COURT ERRED IN REFUSING TO CHARGE THE JURY AS REQUESTED BY THE DEFENDANT IN HIS REQUESTED INSTRUCTION NO. 8.

IV

THE COURT ERRED IN GIVING TO THE JURY ITS INSTRUCTION NO. 14a.

In Nichols Applied Evidence Vol. 5, p 4186 it is stated,

> "The best possible evidence must be produced to prove facts in issue, i. e., the best of which the nature of the case is capable, and

a failure to produce such evidence, and the introduction of inferior evidence, justifies an inference that the reason for not producing the best evidence is because it is unfavorable rather than favorable. In other words, the highest degree of proof of which the case is susceptible must be produced if accessible."

This rule is stated in Bailey v. McCickle, 9 C.J. 430, 446 as follows:

"The object of the rule of law which requires the production of the best evidence of which the facts sought to be established are susceptible, is the prevention of fraud; for, if a party is in possession of this evidence, and withholds it, and seeks to substitute inferior evidence in its place, the presumption naturally arises, that the better evidence is withheld for fraudulent purposes which its production would expose and defeat.

In United States v. Reyburn, 6 Pet (U.S.) 352, 367 it is stated:

"It is said in the books, that the ground of the rule, is a suspicion of fraud, and if there is better evidence of the fact, which is withheld, a presumption arises, that the party has some secret or sinister motive in not producing it. Rules of evidence are adopted for practical purposes in the administration of justice and must be so applied as to promote the ends for which they are designed."

In reliance upon this rule the defendant requested the court to charge the jury in accordance with his request No. 8 as follows:

> "You are instructed that the highest proof of which any fact is susceptible is that which presents itself to the senses of the court or jury. Neglect, then, to produce such evidence by any party who has it in his power justifies an unfavorable presumption against him and you are at liberty to draw an unfavorable inference against either party if you think it warranted under all the circumstances and believe that either party has failed to produce any such evidence."

The court however in its instruction No. 14a instructed the jury as follows:

> "You are instructed that the highest proof of which any fact is susceptible is that which presents itself to the senses of the Court or jury. The evidence in this case without dispute shows that the contents of the suitcase excepting a belt were by the officers released to the owner. In regard to such evidence you are to consider all of the facts and circumstances surrounding such release and you are at liberty to draw such inferences from a consideration of all of the facts and circumstances thereof as you think such facts and circum-

stances justify."

The instruction as given was sterile; it completely ignored the presumption (Tr, 133) to which the defendant was entitled under the decisions above cited, was prejudicial to the rights of the defendant and in effect was an invasion of the jury's perogatives by the court.

While it is true that the reason given by the prosecution for returning the articles inventoried on Exhibit "D" to the owner, before trial, and the failure to produce them at the trial, was because of the need of the witness for them this was a matter of fact for the jury to determine and the court usurped that function in failing to instruct the jury as to the presumption by in effect determining the reason for the failure to produce was as above mentioned.

V

THE COURT ERRED IN REFUSING TO

CHARGE THE JURY AS REQUESTED BY THE DEFENDANT IN HIS REQUESTED INSTRUCTION NO. 1.

The defendant requested the court to return a verdict of not guilty in favor of the defendant. This instruction was refused (R, 8).

We submit that this instruction should have been given because of the failure of the prosecution to prove the crime was committed in Utah County.

The measure of proof to establish venue of crime is the same as that required to establish any material fact in a criminal prosecution. State v. Williams (Mont.) 202 P.2d, 245.

This rule, we believe to be well established and needs no further citation of authority. In fact it is recognized by the court in instruction #6(6). (R, 18)

The only evidence of venue whatsoever in this case is that of officer Adamson who testified that "Provo City and the bus

station here" is in Utah County (Tr, 80). From this testimony it may also be inferred that Harvey's Cafe cater-corner from the bus station (Tr, 37) Bob's Billiards (Tr, 46) and other places where the defendant appeared on October 6, 1948, with the suitcase are also in Utah County. There can, therefore, be no question as to whether the defendant had the property in question in his possession in Utah County. Under the prima facie rule set forth in the court's instruction #11, the jury was entitled to find that the defendant stole the articles if the explanation given by him for their possession was not satisfactor but with all this if the prosecution failed to prove the stealing took place in Utah County the defendant was entitled to be discharged under the instruction requested.

In this phase of our argument we are not unmindful that venue, as well as other elements of the crime may be proved

by circumstantial evidence, and that under certain circumstances the possession of the articles in Provo might be some evidence of venue on which to submit the question to the jury, but under the evidence produced by the State in this case the mere fact of possession within Utah County was not sufficient upon which to submit the case to the jury.

It must be remembered that this suitcase was the property of Carol Ann Bulow who testified that she left Richfield, Utah, by bus on October 6, 1948, at approximately 6:30 P.M. (Tr, 61). Upon leaving Richfield she placed the suitcase on the rack in the bus above her seat and after getting off of the bus at Nephi with other passengers and again at Provo she first missed the suitcase after she got back on the bus at Provo (Tr, 9). She looked for her suitcase before getting off of the bus at Nephi but she never saw it again until

it was exhibited to her at the trial (Tr, 18).

Miss Bulow testified that the bus on which she rode from Richfield arrived in Provo at around 9 o'clock on the evening of October 6, 1948 (Tr, 61). She was definite as to that fact and no attempt was made to show otherwise although if it were not true the State could have clarified the matter. If the bus arrived in Provo at about 9 o'clock it was impossible for defendant to have stolen the suitcase in Utah County because the evidence of Edward Johndrow (Tr, 41) and officer Fred Adamson (Tr, 50) was to the effect that they had both observed the defendant with the suitcase at around 6 o'clock in the evening. No testimony was introduced by the prosecution to show that anyone saw the suitcase after the arrival of the bus at Nephi, which is, of course, in a county other than Utah.

It is true that in this regard

there is some irreconcilable evidence but that evidence is all produced by the State and none of it by the defendant; consequently if the defendant must be given the benefit of all reasonable doubt, the requested instruction should have been given. Certainly the proof is at least as consistent (if not more so) with the taking having been in Nephi as it is with its having been in Utah County and can be explained on such a hypothesis.

The defendant took the witness stand (Tr, 95-100) and testified that he could remember having been drinking heavily while in Richfield on October 6, 1948, but that he had no recollection of boarding the bus or getting off at it at Provo (Tr, 96). The last he remembered was going to the bus station after going for and drinking some beer and whiskey (Tr, 97). He blanked out at the bus station (Tr, 99). He did not remember riding on

the bus from Richfield to Provo and did not remember taking a suitcase from the bus. His first recollection was eating in the restaurant in Provo where officer Adamson and others were present and seeing the suitcase at that time, but he had but a slight recollection as to any conversation about the suitcase (Tr, 99) but did remember going down to jail (Tr, 100).

Edward Johndrow observed that the defendant had been drinking (Tr, 40) but would not say he was drunk (Tr, 41). Officer Adamson also observed that the defendant had been drinking (Tr, 52) but concluded that he was not drunk (Tr, 52).

The question as to whether the defendant was sufficiently under the influence of intoxicating liquor at the time of taking the suitcase may now be foreclosed in view of the verdict of the jury, but we do submit that a reasonable

have required the giving of the instruction requested.

VI

THE COURT ERRED IN REFUSING TO CHARGE THE JURY AS REQUESTED BY THE DEFENDANT IN HIS REQUESTED INSTRUCTIONS NOS. 2 AND 7.

The defendant requested the court to instruct the jury that it could not find the defendant guilty of grand larceny. The instruction was refused (R, 9). He also requested the following instruction: (R, 14

> "You are instructed that larceny is divided into two degrees, the first of which is termed grand larceny and the second, petit larceny. If it appears to you that the defendant has committed the crime of larceny and there is reasonable ground of doubt in which of the two degrees he is guilty, then he must be convicted of the lower of such degrees, or petit larceny."

This instruction was modified by the court's instruction No. 9 (R, 19).

Section 103-31-5 Utah Code Annotated provides as follows:

"When it appears that the defendant has committed a public offense and there is reasonable ground of doubt in which of two or more degrees he is guilty, he must be convicted of the lowest of such degrees only."

We believe that under the above statute defendant's request No. 7 was proper and that the court's substitution of such request by its instruction #7 was prejudicial to the defendant and did not adequately set forth the law.

On the other hand we submit that the court had the duty to determine as a matter of law on the prosecution's evidence whether there was a reasonable doubt as to the value of the articles stolen. When the only evidence of value was that of the State's witness Thomas and where that evidence (even assuming Exhibit "A" was properly in evidence) was conflicting in respect to more than two thirds of the items which he attempted to evaluate we submit that the question as to whether the offense was grand

larceny should have been taken from the jury under the statute by defendant's requested instruction No. 2 or similar instruction.

We respectfully submit that the lower court erred in all of the foregoing respects and that the judgment of the court should be reversed.

Respectfully submitted,

Samuel E. Blackham
Attorney for Defendant
Appellant.